LIBRARY
SUPREME COURT, U. S.

FILED
OCT 30 1969
JOHN F. DAVIS, CLERK

No. 599

In the Supreme Court of the United States

OCTOBER TERM, 1969

NEW ORLEANS CHAPTER, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., APPELLANT

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

MOTION TO AFFIRM

ERWIN N. GRISWOLD,
Solicitor General,
RICHARD W. McLAREN,
Assistant Attorney General,
GREGORY B. HOVENDON,
IRWIN A. SEIBEL,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

INDEX

	Page
Statement	1
1. Dues	3
2. Quantity surveys	8
3. The district court's decision	10
Argument	11
Conclusion	14

CITATIONS

Cases:

Associated Press v. *United States*, 326 U.S. 1	12
Brown Shoe Co. v. *United States*, 370 U.S. 294	2
Cold Metal Process Co. v. *United Co.*, 351 U.S. 445	2
First National Bank of Arizona v. *Cities Service Co.*, 391 U.S. 253	12
International Salt Co. v. *United States*, 332 U.S. 392	12
Kiefer-Stewart Co. v. *Seagram & Sons*, 340 U.S. 211	12
Norfolk Monument Co. v. *Woodlawn Memorial Gardens*, 394 U.S. 700	11
Northern Pacific R. Co. v. *United States*, 356 U.S. 1	12
Poller v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464	11
Sears, Roebuck & Co. v. *Mackey*, 351 U.S. 427	2
United States v. *Diebold, Inc.*, 369 U.S. 654	11, 14
United States v. *Krasnov*, 143 F. Supp. 194, affirmed *per curiam*, 355 U.S. 5	12
United States v. *Socony-Vacuum Oil Co.*, 310 U.S. 150	12
United States v. *Trenton Potteries*, 273 U.S. 392	12
United States v. *United States Gypsum Co.*, 333 U.S. 364	13
United States v. *United States Gypsum Co.*, 340 U.S. 76	13
White Motor Co. v. *United States*, 372 U.S. 253	11, 12

in appropriate contexts, "[s]ummary judgments have a place in the antitrust field * * *." *White Motor Co., supra,* 372 U.S. at 259. See *First National Bank of Arizona* v. *Cities Service Co.,* 391 U.S. 253; *Associated Press* v. *United States,* 326 U.S. 1; *International Salt Co.* v. *United States,* 332 U.S. 392; *Northern Pacific R. Co.* v. *United States,* 356 U.S. 1; *United States* v. *Krasnov,* 143 F. Supp. 184 (E.D. Pa.), affirmed *per curiam,* 355 U.S. 5.

The court below was aware of the limitations on the use of summary judgment in antitrust cases. It refused to dispose summarily of the charge with respect to the Association's Bidding Rule C because, in its view, that charge presented an issue similar to that in *White Motor Co., supra,* in that it was not clear whether the bidding rule "has such a 'pernicious effect on competition and lack of any redeeming virtue'" as to preclude the possibility that "the application of the law [would be] influenced by the shape of the facts as they emerge at trial * * *" (J.S. 19).

As to the dues and quantity survey charges, however, the situation was quite different. No novel theory was presented by allegations that there was an agreement or combination to add certain fixed charges to the bid price. It has long been settled that any agreement or combination which "tampers with price structures" is illegal *per se* without inquiry as to its precise purpose or effect. *United States* v. *Socony-Vacuum Oil Co.,* 310 U.S. 150, 221. See, also, *Kiefer-Stewart Co.* v. *Seagram & Sons,* 340 U.S. 211, 213; *United States* v. *Trenton Potteries,* 273 U.S. 392.

The Association does not challenge the substantive rule of law applied by the district court. Instead, its contention appears to be that summary judgment was an inappropriate vehicle for resolving the issue whether there was an agreement or combination. It argues, on the basis of the affidavits it introduced, that the facts on which the government relied to show an agreement or combination were disputed. Almost all of these affidavits were, however, simply denials in general terms of the existence of an agreement (see n. 4, *supra*, p. 7).

Rule 56(e) requires that the party contending that there is a genuine issue for trial must do more than state conclusions; his response must set forth "specific facts." This requirement is especially pertinent where, as here, the government's case rested essentially on documents which originated in the Association's files, and the Association apparently would have had ready access to any countervailing proof. See 6 Moore, *Federal Practice* (2d ed.) ¶ 56.15[5].

A triable issue is not raised by the mere denial that an agreement exists "[d]espite the language contained in some of these documents * * *" (Def. Ex. 20, p. 1). For the subsequent exculpatory statements of Association officials and members that conflict with contemporaneous written documents neither undermine the impact of such documents nor bar summary judgment based thereon. See *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395–396; cf. *United States* v. *United States Gypsum Co.*, 340 U.S. 76, 82–86.

The Association is mistaken in its insistence that the district court's action "is a clear departure" from *United States* v. *Diebold, Inc.*, 369 U.S. 654 (J.S. 11). That case raised an important and unsettled substantive issue: the meaning and scope of the "failing company" defense in an anti-merger suit under Section 7 of the Clayton Act. The litigation was not simple and uncomplicated. The printed record alone exceeded 635 pages and included lengthy financial statements (No. 286, O.T., 1961, R. 223–258, 334–389) and other economic data (*id.*, R. 607–638), which permitted conflicting inferences. Moreover, there was a "head-on factual controversy" about an important aspect of the case. 369 U.S. at 655. Here, by contrast, the Association's response to the government's motion amounted to little more than bare denials in a case where the government's proof rested on incriminating documents from defendant's files. It was legally insufficient to create a bona fide factual controversy.

CONCLUSION

For the reasons stated the judgment of the district court should be affirmed.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

RICHARD W. MCLAREN,
Assistant Attorney General.

GREGORY B. HOVENDON,
IRWIN A. SEIBEL,
Attorneys.

OCTOBER 1969.

U.S. GOVERNMENT PRINTING OFFICE: 1969